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Federal Communications Commission

WASHINGTON, D.C.

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In re Applications of)	MM Docket No. 93-94	FEDERAL COMMUNICATIONS COMMISSION
SCRIPPS HOWARD BROADCASTING)	File No. BRCT-910603KY	OFFICE OF THE SECRETARY
COMPANY)		
For Renewal of License of)		
Station WMAR-TV,)		
Baltimore, Maryland)		
and)		
FOUR JACKS BROADCASTING, INC.)	File No. BPCT-910903KE	
For a Construction Permit for)		
Television Facility on)		
Channel 2 at)		
Baltimore, Maryland)		

To: The Honorable Richard L. Sippel
Administrative Law Judge

**OPPOSITION TO THRESHOLD SHOWING OF
SCRIPPS HOWARD BROADCASTING COMPANY'S
UNUSUALLY GOOD PAST PROGRAMMING RECORD**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys, hereby opposes the pleading entitled "Threshold Showing of Scripps Howard Broadcasting Company's Unusually Good Past Programming Record." The arguments advanced by Scripps Howard are seriously flawed.

1. Scripps Howard seeks to present a threshold showing of the "unusually good programming record of the television stations it owns that are similar in size and operation to Station WMAR-TV" (i.e., WMAR-TV itself and six stations Scripps Howard owns in far-flung markets -- Detroit, Michigan; Cincinnati, Ohio; Cleveland, Ohio; Memphis, Tennessee; West Palm Beach, Florida;

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and Tulsa, Oklahoma). According to Scripps Howard, credit for past broadcast record can be obtained by a non-integrated group owner.

2. Scripps Howard's arguments must be rejected for a number of reasons. First and foremost, this is a comparative renewal proceeding. Scripps Howard has not pointed to any comparative renewal case in which the incumbent licensee received credit for past broadcast record. The only cases cited by Scripps Howard are comparative new cases. Second, Scripps Howard is seeking past broadcast record credit not only for WMAR-TV but for six other stations that have nothing to do with this proceeding. It appears that Scripps Howard is again seeking to expand the "relevant renewal expectancy period" to include its recent record at its various stations. There is no policy or precedent supporting such an expansion of a renewal expectancy. Third, Commission case precedent does not support a past broadcast record issue, even in a new comparative case, where there is neither integration nor a long and important association of the applicant's principals with the community of license.

3. A review of the cases cited by Scripps Howard is instructive. Knoxville Broadcasting Corp., 103 F.C.C.2d 669 (Rev. Bd. 1986) involved ten applicants, nine of whom were seeking authority to construct a new VHF television station on Channel 8 at Knoxville. The tenth applicant, South Central Communications Corporation, the licensee of Station WTVK-TV ("WTVK"), Knoxville, was seeking modification of its existing license for UHF Channel 26 to specify operation on Channel 8.

WTVK's license renewal application was not designated for hearing. During the hearing proceeding, WTVK sought credit for its past broadcast record. Noting that applicants in licensing cases rarely seek to gain additional credit for past broadcast record, the Review Board carefully explained the distinction between past broadcast record and previous broadcasting experience. It stated:

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance.

Knoxville Broadcasting Corp., supra at 689, citing the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 396 (1965). The Board went on to explain that applicants in licensing cases rarely seek to gain additional comparative credit for any "past broadcast record" because the Commission is interested only in records that are either "unusually good or unusually poor" and because of the "agency's inveterate reluctance to involve itself systematically in any particular broadcast licensee's individualistic programming choices." Id. at 689-90. In a footnote the Board specifically distinguished the "comparative renewal" process which "examines first and foremost, the prior record of an incumbent licensee." Id. at 690.

4. In the Knoxville case, the Review Board went on to note that it was confronted by an extraordinary comparative licensing case which was not of the "comparative renewal" genre. Although

WTVK had pleaded throughout the Commission's extensive VHF "drop-in" proceedings that it be permitted to modify its license to any newly allocated VHF channel 8, its application was designated for a comparative hearing where it was not entitled to the competitive boost of a statutory "renewal expectancy."

Ultimately, the Review Board reversed the ALJ's denial of any integration credit for WTVK's proposed General Manager, and it considered WTVK's past broadcast record.

5. The Knoxville case specifically demonstrates the distinction between new comparative licensing proceedings and comparative renewal proceedings. It does not in any way support the addition of an issue as to past broadcast record in a comparative renewal case. Nor do the other cases cited by Scripps Howard support the addition of a past broadcast record issue in a comparative renewal proceeding. Both Minneapolis Star and Tribune Co., 88 F.C.C.2d 1604 (Rev. Bd. 1982) and Farragut Television Corp., 8 F.C.C.2d 279 (1967) were comparative new licensing cases;^{1/} neither involved a license renewal expectancy.

6. In the comparative renewal context, a renewal expectancy equates to past broadcast record. Thus, in Pillar of Fire, 99 F.C.C.2d 1256 (Rev. Bd. 1984), rev. denied 62 R.R.2d 276 (1987), an FM renewal applicant earned a dispositive renewal expectancy on the basis of its strong preference for its past

1/ Minneapolis Star and Tribune involved an applicant seeking to change frequency. The modification application was designated for hearing with a mutually exclusive new application.

broadcast record. In WIOO, Inc., 95 F.C.C.2d 974 (1983), the Commission stated that a renewal expectancy must be grounded on a showing that the licensee's past broadcast record has been substantial.

7. The question of whether Scripps Howard should obtain any license renewal expectancy given its failure to timely specify a relevant license renewal period is presently before the Presiding Judge. Scripps Howard's attempt to secure a past broadcast record credit on top of renewal expectancy credit or in lieu of renewal expectancy credit is contrary to well established case precedent.

8. Moreover, Scripps Howard's motion seeks credit for its record at six stations that are nowhere near Baltimore, Maryland. Even in comparative new licensing cases, the Commission has never delved into a licensee's past broadcast record outside of the community at issue. Scripps Howard cites no case to support its highly unusual claim that the records of its other stations are relevant to a station in Baltimore, Maryland which it acquired on May 30, 1991.^{2/}

9. Furthermore, Scripps Howard's claim that a past broadcast record issue may be sought by a non-integrated group

^{2/} In any event, Scripps Howard's motion fails to demonstrate that the records of all six other stations are "unusually good." The hurdle is high. To establish an unusually good past broadcast record, an applicant must present a showing that is beyond the bounds of average performance. See e.g. Guy S. Erway, 43 R.R.2d 417 (ALJ 1978). Significantly, Station WDIV-TV, Detroit, Michigan, was severely criticized for its poor children's television showing in the September 1992 report filed with the FCC by the Center for Media Education.

owner must also be rejected. As noted earlier, in Knoxville Broadcasting Corp., supra, the Review Board expressly reversed the ALJ's denial of any integration credit for WTVK's proposal to integrate John Engelbrecht as its General Manager. 103 F.C.C.2d at 699. The issue of whether a non-integrated applicant could receive credit for its past broadcast record was characterized as moot. 103 F.C.C.2d at 684.

10. In Farragut Television Corp., 8 F.C.C.2d 279 (1967), another new comparative proceeding which the Commission described as an "unusual situation," the issue was whether, or to what extent, Peoples Broadcasting Corp. was entitled to credit for ownership participation in the management of station affairs and whether Peoples should be accorded a preference for its past broadcast record. Peoples had claimed a substantial integration preference which the Review Board rejected. The Commission held that in the case of a mutual corporation, the circumstances may be such that it can find the same kind of assurance as is present in conventional cases of integration. In Farragut, the Commission found that certain officers of Peoples with long and important associations with People's broadcast operations in Columbus, Ohio, the proposed community of license, provided that

~~Peoples Broadcasting Corp. had a long and important association with the community of license.~~

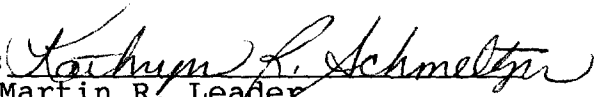
Mr. Lowe or Mr. Rowe have long and important associations with broadcast operations in Baltimore, Maryland. Indeed, Mr. Rowe is not listed in the 1991 WMAR-TV assignment application and therefore his connection to Scripps Howard may be quite recent. Certainly, he lacks a lengthy record as a Scripps Howard officer.

In sum, Scripps Howard's "Threshold Showing" contains multiple flaws. There is no basis whatsoever for adding the issue requested and to do so would unnecessarily complicate this proceeding. Accordingly, for the reasons set forth above, Scripps Howard's "Threshold Showing of Unusually Good Past Programming Record" should be denied.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

By:


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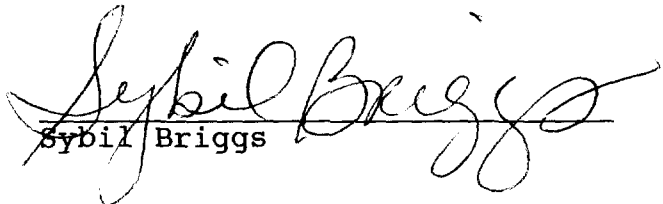
CERTIFICATE OF SERVICE

I, Sybil Briggs, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "OPPOSITION TO THRESHOLD SHOWING OF SCRIPPS HOWARD BROADCASTING COMPANY'S UNUSUALLY GOOD PAST PROGRAMMING RECORD" were sent this 26th day of May, 1993, by first class United States mail, postage prepaid, to the following:

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